83-339

Office-Supreme Court, U.S.
FILED
AUG 27 1983
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No._____

IN THE

SUPREME COURT OF THE UNITED STATES

October Term. 1983

EILEEN M. PROVODA,
Petitioner,

-VS-

BELEN BOARD OF EDUCATION,
D/B/A BELEN CONSOLIDATED
SCHOOLS, et al.,
Respondents.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT
PETITION FOR A WRIT OF CERTIORARI

STUART HINES, ESQ.
2901 Juan Tabo, N.E.
Suite 116
Albuquerque, New Mexico 87112
Telephone: (505) 292-1660

Randall L. Thompson, Esq.
Copper Square, Suite 444
500 Copper Avenue, N.W.
Albuquerque, New Mexico 87102
Telephone: (505) 842-6862

QUESTIONS PRESENTED FOR REVIEW

Does the Tenth Circuit Court of Appeals' failure to properly recognize a constitutionally protected right as set forth by this Court require a reversal and remand?

LIST OF ALL PARTIES

PETITIONER

Eileen M. Provoda

RESPONDENTS

Belen Board of Education, d/b/a Belen Consolidated Schools
Alfred Fishcer, Principal
Glenn Oliver, Curriculum Supervisor
Joe Garcia, Superintendent
Gillie Sanchez, School Board Member
Richard Chavez, School Board Member
Corrine Sedillo, School Board Member
Nich Sanchez, School Board Member
Robert Lindberg, School Board Member

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UNITED STATES CONSTITUTION:

Amendment I

Amendment XIV

RULES AND STATUTES:

42 U.S.C. §1983

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PETITION FOR A WRIT OF CERTIORARI

For her petition that a writ of certiorari issue to review the Opinion of the United States Court of Appeals for the Tenth Circuit affirming the Judgment of the United States District Court for the District of New Mexico, Eileen M. Provoda shows the Court the following.

OPINIONS BELOW

Ms. Provoda appealed the Judgment of the United States District Court for the District of New Mexico to the United States Court of Appeals for the Tenth Circuit. The United States Court of Appeals for the Tenth Circuit affirmed the Judgment of the United States District Court for the District of New Mexico in an unpublished Opinion appended hereto as Appendix A.

STATEMENT OF JURISDICTIONAL GROUNDS

The Tenth Circuit Court of Appeals entered its unpublished Opinion affirming the Judgment of the United States District Court for the District of New Mexico on May 31, 1983.

The statutory provision believed to confer on this Court jurisdiction to review the Opinion of the Tenth Circuit Court of Appeals affirming the Judgment of the United States District Court for the District of New Mexico by writ of certiorari is 28 U.S.C. 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

UNITED STATES CONSTITUTION:

Amendment I

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

Amendment XIV

Section 1. Citizens of the United States.

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

RULES AND STATUTES:

42 U.S.C. §1983

Civil Action for Deprivation of Rights.

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United State or

other person with the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

STATEMENT OF THE CASE

Ms. Eileen Provoda was hired as a non-tenured elementary school teacher by the Belen, New Mexico Board of Education for the 1975-1976 school year. At the end of that school year, the Board voted to not renew her teaching contract for the following year. Under 42 U.S.C. §1983, she filed suit in the United States District Court for the District of New Mexico against the Belen Board of Education and its members, the New Mexico Board of Education and its members, the Superintendent and the Curriculum Coordinator of the Belen Board of Education, and the principal of the elementary school where she had taught. The primary basis of her suit against the defendants was the allegation that she had not been rehired by the Belen Board of Education for the 1976-1977 school year because she engaged in conduct protected by the First Amendment of the Constitution of the United States. As an additional basis, she alleged a violation of her due process rights under the Fourteenth Amendment to the Constitution of the United States. Subsequent to the dismissal of defendants the New Mexico Board of Education and its members on summary judgment, the case proceeded to a jury trial on March 2, 1981. At the conclusion of the Plaintiff's case-in-chief, the Honorable Santiago Campos, District Judge, directed a verdict of the jury in favor of the remaining defendants on all counts. The basis for the District Court's directed verdict was that the evidence presented in the plaintiff's case-in-chief was insufficient to warrant submission of the matter to the jury. Ms. Provoda appealed to the United States Court of Appeals for the Tenth Circuit. On May 31, 1983, the Tenth Circuit Court of Appeals entered its unpublished Opinion affirming the District Court's judgment in all respects.

In her appeal to the Tenth Circuit, Ms. Provoda raised the

question of whether the trial court properly directed the verdict of the jury in favor of the defendants at the conclusion of her case-in-chief. Her argument was that the trial court committed error in directing the verdict of the jury in favor of the defendants because: (1) she established a liberty interest protected by the Fourteenth Amendment which was denied her without due process of law; (2) she established a property interest protected by the Fourteenth Amendment which was denied her without due process of law; and (3) the evidence, looked at in the light most favorable to the plaintiff, established an issue of fact which the jury should have decided, and the trial court improperly weighed the evidence in favor of the defendants.

In support of her argument on appeal, Ms. Provoda showed the Tenth Circuit Court that the evidence substantiated the following material facts of her case.

Ms. Provoda had previously taught in the Belen School District for three years and had established a reputation among parents, teachers and the administration for being an excellent teacher. She returned to her home state of Massachusetts to teach for a year, but subsequently decided to return to New Mexico. Through the personal recommendation of her friend Mr. Fischer, the defendant Principal, she obtained the teaching position in the Belen School District. During the early fall of the school year, Ms. Provoda's relationship with the teaching staff and administration was satisfactory, but she became involved in a dispute with the defendant Curriculum Supervisor Mr. Oliver, when she criticized the School District's policy of discriminatory use of teaching materials for the third grade reading program. Although other teachers agreed with Ms. Provoda's position, the dispute engendered ill feelings between Ms. Provoda and Mr. Oliver as well as between Ms. Provoda and Mr. Fischer.

According to the Belen Board of Education Handbook, nontenured teachers, such as Ms. Provoda, were to be evaluated by November 1, followed by a second evaluation by February 1, followed by a final evaluation to be performed at the time the recommendation for reemployment was made.

On November 6, 1975, Ms. Provoda received her first evaluation from Mr. Fischer, who gave her the highest ratings possible in all categories and made additional laudatory comments. At this time, however, conflicts were developing between Mr. Fischer and Ms. Provoda because of her criticisms to him concerning his policy of allowing unnecessary and disruptive interruptions of her classes. Mr. Fischer informed her that he didn't know how she was going to last at the school.

On January 30, 1976, Mr. Fischer presented Ms. Provoda with her second evaluation and told her to sign it. Upon review, Ms. Provoda refused to summarily sign the evaluation without an opportunity, as provided by the Handbook, to discuss the reasons for the now negative ratings. Mr. Fischer refused to discuss it and Ms. Provoda returned the evaluation unsigned. Mr. Fischer did not make any attempts to observe Ms. Provoda's classroom teaching prior to making the evaluation ratings of her classroom teaching. Ms. Provoda subsequently sent Mr. Fischer a series of letters requesting a meeting to discuss the evaluation. A meeting was held on February 5, 1976 between Mr. Fischer, Ms. Provoda and a representative of the National Education Association. A copy of the January 30, 1976 evaluation was presented to Ms. Provoda which she contended had been altered from its original highly negative character. Ms. Provoda subsequently confronted Mr. Fischer about her contention that he had altered the evaluation and he denied having done so. Unable to resolve the dispute, Ms. Provoda requested that a staff member of the New Mexico Department of Education evaluate her.

As a result of a series of letters to defendant Superintendent of Schools Mr. Joe Garcia, a meeting was held between Ms. Provoda, Mr. Fischer and Mr. Garcia. Ms. Provoda was then informed that in spite of her protests of his bias, Mr. Fischer would write Ms. Provoda's final evaluation. Because the personal relationship between Ms. Provoda and Mr. Fischer had continued to deteriorate as a result of Ms. Provoda's criticisms of school policies, Ms. Provoda was fearful of another biased evaluation, which would jeopardize her continuing

employment, and informed Mr. Garcia and Mr. Fischer that she would not allow Mr. Fischer into her classroom to perform an evaluation.

On April 28, 1976, Mr. Fischer and Mr. Oliver went to Ms. Provoda's classroom to observe. Ms. Provoda, fearing another biased evaluation, protested their entry into her classroom. Disregarding her, then entered her classroom, whereupon Ms. Provoda became ill, requested they secure a substitute teacher, which they did, and subsequently left the classroom. After she had arrived at her home, she went to Santa Fe, New Mexico, and met with an attorney and a representative of the National Education Association. The representative called Mr. Joe Garcia and requested his intervention in securing an evaluation of Ms. Provoda by someone other than Mr. Fischer.

The following day, Ms. Provoda returned to work and was met by Mr. Fischer and Mr. Oliver who presented her with a letter of suspension from employment because of her "insubordination" the previous day. The police were present ostensibly to insure that, as a "trespasser", she would peaceably vacate the premises, which she did.

On May 13, 1976, the defendant Board of Education held a hearing to consider whether Ms. Provoda should remain under suspension from her employment. Both Ms. Provoda and the Board were represented by counsel. At the hearing, Mr. Fischer testified that he had not altered the January 30, 1976 evaluation. Ms. Provoda maintained that the evaluation was not the same as had been presented to her by Mr. Fischer. The defendant Gillie Sanchez, who was acting chairman of the Board, arrived quite late in the hearing and upon his arrival assumed control of the questioning at the hearing. He exalted Mr. Fischer's virtues, indicated that no one could believe Ms. Provoda, and made derogatory remarks concerning her mental fitness (she needed psychiatric help). He indicated that he didn't have to have heard the testimony previously given because he knew all about the case. His general demeanor was that his mind was already made up. A closed door executive session was called during the hearing to discuss the personal

relationship between Mr. Fischer and Ms. Provoda. Subsequent to this closed door session, a motion was made and carried that Ms. Provoda be allowed to finish out the school year. In addition, however, the Board voted to not rehire her for the following year due to her "insubordination". The third evaluation of Ms. Provoda's teaching performance was never given either prior to or after the hearing.

Ms. Provoda wrote a series of letters to the Board asking the members to reconsider their decision, which efforts were to no avail. Subsequently, Ms. Provoda applied to twenty-three school districts in New Mexico, but was denied a teaching position by every district.

ARGUMENT

The issue raised by this case is one that should be settled by this Court because the decision of the Tenth Circuit Court of Appeals in this case is in conflict with the proper recognition of a constitutionally protected right as set forth by this Court.

The Tenth Circuit Court of Appeals, in its Opinion affirming the District Court's Judgment, cited *Schmidt v. Fremont County School District*, 558 F.2d 982 (10th Cir., 1977) as controlling on the threshold issue of whether Ms. Provoda's speech and conduct rose to the level of constitutionally protected speech. Noting that here, as in the *Schmidt*, supra, case, Ms. Provoda's criticisms and conduct were made at school and pertained to internal affairs, the Court summarily concluded that her speech and conduct did not invoke First Amendment protection.

The apparent reasoning of the Tenth Circuit Court of Appeals was that since Ms. Provoda's speech did not invoke First Amendment protection under *Schmidt*, supra, then the District Court properly directed the verdict in favor of the defendants because Ms. Provoda simply failed to carry her burden under *Mt. Healthy City School District Board of Education v. Doyle*, 429 U.S. 274, 50 L.Ed.2d 471, 97 S.Ct. 568 (1977), of showing that her speech and conduct was constitutionally protected *and* that it was the substantial or motivating factor in

the Belen Board of Education's decision not to rehire her.

It is submitted to this Court that the Tenth Circuit Court of Appeals' reasoning based on *Schmidt*, supra, is incorrect as applied to the facts in evidence in this case. More importantly, it is submitted to this Court that the application of the *Schmidt*, supra, decision to this case is in conflict with this Court's decision in *Givhan v. Western Line Consolidated School District*, 439 U.S. 410, 58 L.Ed.2d 619, 99 S.Ct. 693 (1979).

In that case, this Court considered the Fifth Circuit Court of Appeals' reversal of the District Court's holding that the Petitioner's dismissal by the School District had violated the Petitioner's First Amendment rights. The District Court had found that the Petitioner had made private complaints to the school principal concerning the School District's employment policies and practices, which the Petitioner conceived to be racially discriminatory in purpose and effect, and that these privately communicated complaints to the school principal concerning School District policies were the primary reason for the School District's failure to renew the Petitioner's contract of employment. The Fifth Circuit Court of Appeals reversed the District Court, reasoning that because Petitioner had privately expressed her complaints and opinions to the principal, her expressions were not protected under the First Amendment.

This Court was unable to agree with the Fifth Circuit Court of Appeals that the private expression of one's view is beyond constitutional protection, and emphasized that:

> This Court's decisions in *Pickering*,*Perry* and *Mt. Healthy* do not support the conclusion that a public employee forfeits his protection against governmental abridgment of freedom of speech if he decides to express his view privately rather than publicly.
>
> The First Amendment forbids abridgment of the "freedom of speech". Neither the Amendment itself nor our decisions indicate that this freedom is lost to the public employee who arranges to communicate privately with his employer rather than to spread his view before the public. We decline to adopt such

a view of the First Amendment.

The Tenth Circuit Court of Appeals, as did the Fifth Circuit Court of Appeals in *Givhan*, supra, misconstrued what properly constitutes constitutionally protected speech and conduct. Ms. Provoda's criticisms to the Curriculum Supervisor and the Principal concerning the discriminatory and disruptive policies countenanced by the Belen Board of Education were indeed matters communicated at school and not in a public forum. As *Givhan*, supra, holds however, such speech is nonetheless constitutionally protected even though it may be communicated privately. The Tenth Circuit Court of Appeals noted that in this case, as in *Schmidt*, supra, the criticisms made by Ms. Provoda concerned internal policies of the school and thus were not of public concern. However, the Petitioner in *Givhan*, supra, made criticisms of the School District's policies which were nonetheless considered by this Court as sufficient to qualify as expressions of public concern meriting constitutional protection. Ms. Provoda's criticisms can be considered no less than of public concern to those parents in the community concerned about the Belen Board of Education's policies for properly instructing their children. See *Smith v. Losee*, 485 F.2d 334 (10th Cir.) cert. denied 417 U.S. 908, 94 S.Ct. 2604, 41 L.Ed.2d 212; *Simineo v. School District No. 16, Park City, Wyoming*, 594 F.2d 1353 (1979).

Assuming that Ms. Provoda's speech and conduct was constitutionally protected in accordance with *Givhan*, supra, she still had the *Mt. Healthy*, supra, burden of showing that her speech and conduct were the substantial and motivating factors in the Belen Board of Education's decision to not rehire her.

It is submitted to this Court that the evidence was indeed sufficient to support an inference by the jury that Ms. Provoda's protected speech and conduct gave rise to the Principal's biased and retaliatory negative evaluation of January 30, 1976, and his and the Superintendent's refusal to accomodate Ms. Provoda with an independent, unbiased evaluation. In light of the importance attached to the evaluations in making recom-

mendations of continued employment, Ms. Provoda had a legitimate and substantial fear that Mr. Fischer and Mr. Oliver were attempting to carry forward with a further retaliatory and biased evaluation on April 28, 1976. As Ms. Provoda's counsel argued to the trial court, the action of opposing their entry into her classroom, which Ms. Provoda admitted, could also be reasonably inferred by the jury to be an action of free speech conduct to protect her legitimate expectation of a third unbiased evaluation and continued employment. Given this inference of Ms. Provoda's protest against entry by Mr. Fischer and Mr. Oliver on April 28, 1976, the jury could reasonably have found that Ms. Provoda's constitutionally protected speech and conduct played a substantial role in the Belen Board of Education's decision not to rehire her. The reasonable possibility of this inference being drawn from the evidence by the jury precludes the propriety of the Tenth Circuit Court of Appeal's decision affirming the District Court's directed verdict.

The standards for sustaining a directed verdict have long been recognized. Only when the evidence is all one way or so overwhelmingly in favor of the movant that the trial court in the exercise of its sound discretion would be required to set the contrary verdict aside should such a motion be granted. *Chicago, Rock Island and Pacific Ry. Co. v. Howell*, 401 F.2d 752 (10th Cir., 1968). The Court must view the evidence in the light most favorable to the party opposing the motion, and that party is to be given the benefit of all inferences which the evidence fairly support, even though contrary inferences might reasonably be drawn. *Continental Ore Co. v. Union Carbide & Carbon Corp.*, 370 U.S. 690, 82 S.Ct. 1404, 8 L.Ed.2d 777 (1962). It is only when no reasonable inference may be drawn from the evidence other than that propounded by the movant that the granting of the motion will be considered proper. *Bertot v. School District No. 1, Albany County, Wyoming*, 522 F.2d 1171 (10th Cir., 1975); *Epoch Producing Corp. v. Killiam Shows, Inc.*, 522 F.2d 737 (2nd Cir., 1975).

The fact that the Tenth Circuit Court of Appeals improperly applied the reasoning of the *Schmidt*, supra, decision to

this case, rather than this Court's reasoning in the *Givhan*, supra, case, and that reasonable and conflicting inferences could be drawn from the evidence with regard to whether Ms. Provoda's protected speech and conduct played a substantial role in the Belen Board of Education's decision to not rehire her raises important questions with regard to the consistency in the federal courts of the proper recognition of a constitutionally protected right as set forth by this Court.

CONCLUSION

For the foregoing reasons Ms. Eileen M. Provoda respectfully prays this Court to grant her petition for a writ of certiorari to review the Opinion of the United States Court of Appeals for the Tenth Circuit affirming the Judgment of the United States District Court for the District of New Mexico.

Respectfully submitted,

STUART HINES, ESQ.

2901 Juan Tabo, N.E.
Suite 116
Albuquerque, New Mexico 87112
Telephone: (505) 292-1660

Randall L. Thompson, Esq.
Copper Square, Suite 444
500 Copper Avenue, N.W.
Albuquerque, New Mexico 87102

APPENDIX A
TENTH CIRCUIT

No. 81-1495

EILEEN M. PROVODA,
Plaintiff-Appellant,
v.
BELEN BOARD OF EDUCATION,
D/B/A BELEN CONSOLIDATED
SCHOOLS, et al.,
Defendants-Appellees.

Appeal from the United States District Court
For the District of New Mexico
(D.C. Civil No. 78-365-C)

OPINION

This case has been submitted on the briefs, all parties having waived oral argument.

Eileen Provoda was employed as an elementary school teacher by the Belen, New Mexico Board of Education for the 1975-1976 school year. Ms. Provoda was a non-tenured teacher, and at the end of the school year her teaching contract was not renewed for the ensuing year. Under 42 U.S.C. §1983, Ms. Provoda then brought suit against the Belen Board of Education and its members, the New Mexico Board of Education and its members, the school's superintendent, the principal of the grade school where she had taught, and the curriculum coordinator. As counsel states in his brief, the primary basis for Provoda's suit was her belief that she was not rehired for the 1976-1977 school year because she engaged in conduct protected by the First Amendment. Secondarily, Ms. Provoda also claims a violation of her Fourteenth Amendment rights. At the conclusion of the plaintiff's case-in-chief, the district court, on

motion, directed a verdict in favor of all defendants. The basis for the lower court's action was that the evidence was insufficient to warrant submission of the matter to a jury. Ms. Provoda appeals. We affirm.

Ms. Provoda's case consisted, in the main, of her own testimony, and the testimony of various school officials and board members who were called as adverse witnesses. The salient facts are not in dispute. During the 1975-1976 school term, Ms. Provoda had a continuing argument with the curriculum coordinator concerning the prescribed reading program for third grade. Ms. Provoda did not like the way in which the program was being implemented by the curriculum coordinator, and she told him so. The curriculum coordinator, in turn, was not swayed by Ms. Provoda's complaints. Additionally, Mr. Provoda had an on-going argument with the school principal concerning the latter's evaluation of Ms. Provoda's teaching abilities. It was in this general setting that the school principal and the curriculum coordinator went to Ms. Provoda's classroom on April 28, 1976, proposing to observe her teaching abilities. Ms. Provoda informed her principal and the curriculum coordinator that she would not allow them in her classroom. When they nonetheless entered, she left the classroom, claiming that she was ill. She then drove to Santa Fe, New Mexico, and conferred with, among others, an attorney.

Based on the fact that she had refused admittance to the school principal and the curriculum coordinator, and that she, in a sense, had walked off her job, Mrs. Provoda was suspended. At Ms. Provoda's request, a hearing to consider the suspension was later held before the Belen Board of Education, at which time she was represented by her attorney. At the hearing, all interested parties were examined and cross-examined. The Board of Education then lifted the suspension order and allowed Ms. Provoda to finish the 1975-1976 school year, but also determined that she should not be rehired for the ensuing year.

As indicated, Ms. Provada's basic contention is that she was not rehired because she had exercised her First Amendment

right of free speech. Under Mt. Healthy City School District Board of Education v. Doyle, 429 U.S. 274, 287 (1977), Ms. Provoda had the burden of showing that her conduct was constitutionally protected, and that her constitutionally protected conduct was the "substantial" or "motivating" factor for the Board's refusal to rehire her. In this regard, the district court was of the view that plaintiff's evidence was insufficient to require submission of the case to the jury, and that, in fact, plaintiff's own evidence showed that she was not rehired for a permissible reason, i.e., insubordination.

In Schmidt v. Fremont County School District, 558 F.2d 982 (10th Cir. 1977) a non-tenured high school principal was not rehired for an ensuing year, and he brought suit claiming that the reason he was not rehired was that he had exercised his First Amendment right of free speech. After trial to the court, judgment was entered for the defendants. In affirming, we observed that the statements of the plaintiff were not on issues of general public concern, but were statements made at the school concerning internal affairs of the school system. Such sort of statements, we held, citing cases, did not invoke First Amendment protection. So here, Ms. Provoda's speech was made at the school and pertained to internal school affairs. We recognize that the instant case, unlike *Schmidt*, was disposed of by the district court on a motion by the defendants for a directed verdict. However, in Bertot v. School District No. 1, 522 F.2d 1171 (10th Cir. 1975) we upheld a partial directed verdict in a 1983 proceeding with the observation that a mere scintilla of evidence is not sufficient to justify submitting the matter to a jury. In *Bertot*, two non-tenured teachers were not rehired. They claimed that they were not rehired in retaliation for the exercise of their First Amendment right of free speech, and also that their right to due process guaranteed by the Fourteenth Amendment had been violated by the procedures followed by the School Board. In this latter connection, we stated that the Constitution does not require a hearing before nonrenewal of a non-tenured teacher unless the teacher can show deprivation of a "liberty" or that he had some "property" in-

terest in continued employment, notwithstanding his lack of tenure. Such was not shown in *Bertot*, nor was it shown here. *Bertot*, then, disposes of Ms. Provoda's additional contention that she was deprived of due process because she did not know that the hearing concerning her suspension might eventually lead to a decision by the Board not to rehire her.

Judgment affirmed.